



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 28, 1995

Mr. Gregory Pfeifer
Staff Attorney
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR95-540

Dear Mr. Pfeifer:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 31820.

The Texas Natural Resource Conservation Commission (the "TNRCC") received an open records request for the following information:

The documents are requested in connection with the prosecution of the following civil lawsuit:

Cause No. 93-07736; Arsarco Incorporated, Chevorn U.S.A. Inc., Missouri Pacific Railroad, A Delaware Corporation d/b/a/ Union Pacific Railroad Company, Renderbrook-Spade, Inc., Shell Pipe Line Corporation, and W.R. Grace & Co. vs. Texas Water Commission including the Counterclaim styled; Cause No. 93-07736; Fina Oil and Chemical Company and Fina, Inc. and Arsarco Inc., et al. vs. Texas Natural Resource Conservation Commission, et. al.

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Specific areas of information requested:

Any and all documents, memorandum, pleadings, studies, correspondence, site assessments, agreements, all responses to discovery by all parties, reports, or evaluations relating in any way to the events surrounding any matter which is involved in the above-styled causes of action, excluding correspondence between the TNRCC and its lawyers and the privileged work product of TNRCC's lawyers.

You state that TNRCC "has made open all documents in the above referenced case that pertain to public health and safety." You state that these documents will be made available for the requestor's review. However, you assert that portions of the requested information are excepted from required public disclosure pursuant to sections 552.103(a), 552.107, and 552.111 of the Government Code. You have submitted for our review representative samples of the subject documents and a copy of TNRCC's original counterclaim in the lawsuit at issue.

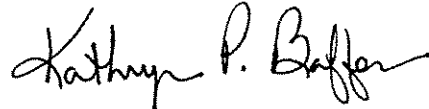
Section 552.103 of the Government Code excepts from required public disclosure information that relates to pending or reasonably anticipated litigation to which a governmental body is a party. *See* Open Records Decision No. 588 (1991). The copy of the original counterclaim you submitted indicates that a lawsuit is pending. After reviewing the documents submitted, which are representative samples of the type of information you seek to withhold, we find that they relate to the pending lawsuit. We therefore conclude that TNRCC may withhold the requested information based on section 552.103(a) of the Government Code.

In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, for example, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the anticipated litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Having concluded that the commission may withhold the requested information based upon section 552.103(a), we need not address your claims under sections 552.107 and 552.111 of the Government Code. We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Kathryn P. Baffes". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Kathryn P. Baffes
Assistant Attorney General
Open Government Section

KPB/rho

Ref.: ID# 31820

Enclosures: Submitted documents

cc: Mr. Steven R. Baker
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(w/o enclosures)